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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIAM DRISCOLL, Plaintiff and Appellant, v. CB RICHARD ELLIS, INC., et al., Defendants and Respondents.	D052929 (Super. Ct. No. GIC874160)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed.

In this disability discrimination case, plaintiff and appellant William Driscoll, a real estate sales person, appeals from a judgment entered on an order granting summary judgment in favor of his former employer, defendant and respondent CB Richard Ellis, Inc. (CBRE), and two of his former supervisors, defendants and respondents Jeffrey Woolson and Mark Read. Driscoll contends he raised triable issues of fact as to whether

defendants' stated business reasons for a group of adverse employment decisions were pretexts for disability discrimination.

Like the trial court, we find the defendants articulated a valid business reason for each employment decision Driscoll challenges and, further, that the record does not contain any facts which would support an inference the stated reasons were mere pretexts for discriminatory conduct. In particular, defendants presented evidence to the effect that Driscoll was not given responsibility for particular client accounts either because of circumstances outside the control of Driscoll's supervisors or because of the expressed preferences of a CBRE client. Defendants presented further evidence that Driscoll's supervisor took responsibility for managing potential government contracts from Driscoll because the supervisor determined a supervisor needed to manage that aspect of CBRE's business.

Contrary to his argument on appeal, in response to the evidence defendants presented in support of their motion for summary judgment, Driscoll did not present any evidence which, considered on its own or collectively, suggests the reasons offered by defendants were anything other than the bona fide reasons defendant made the challenged employment decisions. Rather, he relies in the main on the fact that the decisions were made after one of his supervisors and some of his coworkers learned that he suffered from post-traumatic stress disorder (PTSD). While that chronology of events was sufficient to give rise to a prima facie case of discrimination, once defendants offered valid business reasons for their decisions, Driscoll was required to produce evidence

which more directly undermined the credibility of the reasons offered by defendants. Driscoll failed to do so.

Because defendants presented unrebutted evidence of valid business reasons for the challenged employment decisions, they were entitled to summary judgment on Driscoll's discrimination claim. They were also entitled to summary judgment on his closely-related claims for constructive discharge, harassment and breach of contract. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *PTSD*

Driscoll flew for the Navy during the Vietnam war, and he is a highly decorated veteran. He left active duty in 1981. The same year, he obtained his real estate salesperson license and entered into a broker-salesman contract with a company that later merged with CBRE. He worked as a commissioned salesperson in CBRE's Carlsbad office.

Driscoll "had difficult nightmares and thoughts" regarding his combat missions. In the fall of 2001 he became more troubled and his work began to suffer. Driscoll's sales fell dramatically, and because the revenue he generated fell below a certain point, CBRE considered him a low performer and decreased his share of the commissions he earned for the company.

In February 2002 Driscoll received a formal diagnosis of PTSD. Driscoll was embarrassed about the diagnosis and decided not to reveal it to anyone at CBRE.

Notwithstanding his embarrassment, Driscoll applied for benefits available under a disability insurance policy. In November 2002 the insurer, UnumProvident Corporation (Unum), sent Mia Bagaybagayan, an office services manager at CBRE, a questionnaire asking for information on Driscoll's employment and compensation, and his written authorization for the release of the information. The materials Unum sent did not reveal the nature of his disability.

Read, CBRE's senior managing director in San Diego County, reviewed the Unum materials, and completed the questionnaire with the assistance of Bagaybagayan, and two members of CBRE's human resources department, Sue King and Donna Casey. Read then returned the completed questionnaire to Unum.

According to Read, he assumed Driscoll had some type of health problem, and he met with Driscoll to express sympathy and support. During the meeting, Driscoll volunteered he had PTSD. Read offered to give Driscoll up to six months' leave, but Driscoll refused the offer and said he intended to keep working. Driscoll asked Read to keep his disability confidential, and according to Read he respected Driscoll's wishes and never discussed the matter with anyone else at CBRE, other than Bagaybagayan, King and Casey. Driscoll concedes that after meeting with Reed, he did not discuss his disability with anyone at CBRE.[1]

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1 According to Driscoll, Read telephoned rather than met with him to discuss his disability, and during the call he did not tell Read he had PSTD. Driscoll agrees that Read said "he was sorry, and I could take as much time off as was necessary." Driscoll makes much of these conflicts, but they are not material to the issues on summary judgment.

2. *Adverse Employment Decisions*

According to Driscoll, commencing in February 2003, CBRE made a series of five decisions about his responsibilities for various accounts which adversely impacted him and eventually led to what he characterizes as his constructive discharge. The five decisions are as follows:

A. *Titan Systems (Titan)*

Beginning in the spring of 2002, Driscoll had made an effort to solicit brokerage business from Titan, a defense contractor. To that end he had a number of meetings with a local Titan executive he knew, along with other Titan executives. According to Driscoll, in the spring of 2003, Read told him that he would get the Titan account at CBRE. Later, Driscoll learned from his contacts at Titan that the agent who had been handling the Titan account for another broker was leaving the employ of the broker and that CBRE had an opportunity to get the account. According to Driscoll, notwithstanding his contacts with Titan, and the promise he received from Reid, the Titan account was given to other CBRE agents.

B. *Bressi Ranch*

In the spring of 2003, Driscoll represented the purchaser of a 132-acre undeveloped parcel in Carlsbad. Following acquisition of the parcel known as Bressi Ranch, the purchaser planned to subdivide the land into a number of parcels and develop it as a business park. Because he had represented the purchaser in its acquisition of Bressi Ranch, Driscoll expected that when the property was subdivided he would act as one of the senior agents for the purchaser in its effort to resell the individual parcels.

However, when CBRE was chosen to handle the resale, Driscoll was given only a very minor role in CBRE's resale team. Driscoll believed the purchaser was not anxious to have him participate in the resale effort because Read and Woolson had contacted the purchaser and discouraged the purchaser from using Driscoll.

C. *Morgan Stanley*

In September 2004 Driscoll spoke with the local representative of Morgan Stanley about the fact that its then-current lease for its Carlsbad office was due to expire. Driscoll had represented Morgan Stanley in the past and wanted to represent it in its negotiation for a new lease. The Morgan Stanley representative told Driscoll CBRE could have the listing if CBRE was willing to give Morgan Stanley a 50 percent discount on its usual commission.

When Driscoll attempted to get CBRE to agree to the discount, he faced unexpected hurdles. Read told him that, unbeknownst to Driscoll, all Morgan Stanley listings were being handled through a broker in CBRE's New York office. However, Driscoll later found out that the New York broker did not want to handle the Carlsbad negotiation because it was too small. Driscoll believed that the information he received from Read was inaccurate and an attempt to redirect business away from him.

D. *Base Realignment and Closure (BRAC)*

In April 2005 Driscoll began an effort to obtain some of the business from the Navy which would be generated as a result of the then-ongoing Base Realignment and Closure (BRAC) proceedings. Driscoll traveled to Colorado for a three-day conference

of BRAC contractors and to Washington, D.C. to make contact with members of the local congressional delegation and defense department officials.

CBRE officials in Washington who were coordinating the company's efforts to obtain the BRAC work prepared an organizational chart of the CBRE team that would work on the account if CBRE was successful in obtaining it. The chart indicated that rather than directly participating in the BRAC work for the government, Driscoll would act only in an advisory capacity.

E. *GSA Representative*

The General Services Administration (GSA) is a federal agency which procures outside contractors for the federal government. In 2005 Driscoll began a process by which he could become certified as CBRE's GSA representative. Initially, Read supported this effort. However, as Driscoll moved through the process, Read decided that Read would become the GSA certified representative for CBRE.

3. *Client Interference*

Although not alleged in the complaint, Driscoll also claimed defendants interfered with his relationship with two of his clients, Pat Jones and Dr. Dennis Carlo.

A. *Jones*

In 2003 Driscoll was meeting with a major golf course client, Pat Jones, at CBRE's offices. Woolson walked by, said hello to Jones and sat down and monopolized Jones in a lengthy conversation. According to Driscoll, Woolson took up all of Jones's available time.

B. *Carlo*

In October 2003 Driscoll invited Read and Woolson to have lunch with Dr. Dennis Carlo, a long-time client of Driscoll and the head a biotech company. According to Dr. Carlo, during most of the lunch Read and Woolson did not seem very interested in him or his potential needs. However, near the end of the lunch, Driscoll excused himself to use the bathroom. At that point Read and Woolson became very interested in Dr. Carlo's potential business and told him that there were other brokers at CBRE, including themselves, who had more experience and expertise than Driscoll. Dr. Carlo interpreted these comments as an effort to take business away from Driscoll. Dr. Carlo was shocked by what Read and Woolson said and afterwards told Driscoll about the incident.

Finally, Driscoll alleged defendants told him that he was one of the " 'retread' or 'reject' " brokers in CBRE's Carlsbad office."

4. *Litigation*

According to Driscoll after the PTSD diagnosis, "I did make substantial changes to my life, including education, medication, therapy and life style in a serious attempt to become fully productive at work, at home, and in the community" and in 2004 "I was back in the game. . . . In 2004, I was again the top producer in the Carlsbad office and made $526,710 in broker fees for CBRE, being paid one-half of those fees."

Nonetheless, in January 2006 Driscoll filed a complaint with the Department of Fair Employment and Housing (DFEH) alleging discrimination based on mental

disability. In late February or early March 2006, Driscoll resigned his position with CBRE.

In October 2006, after receiving a right to sue letter from DFEH, Driscoll sued: CBRE; Jeffrey Woolson, who was CBRE's managing director of its Carlsbad office, and Driscoll's immediate supervisor; Read, who was Woolson's supervisor; and William Chillingworth, who was CBRE's western regional manager and Read's supervisor. The complaint included causes of action against CBRE for disability discrimination in violation of the Fair Employment and Housing Act (FEHA; Gov. Code, § 12940 et seq.), breach of contract and breach of the implied covenant of good faith and fair dealing, and constructive termination in violation of public policy; and against all defendants for harassment based on disability, and intentional and negligent infliction of emotional distress. In July 2007 Driscoll filed a first amended complaint (hereafter complaint) that included the same causes of action.[2]

The complaint alleged that beginning in April 2003, about five months after Read learned of Driscoll's disability, and continuing to December 2005, CBRE discriminated against him with respect to the Titan Systems, Bressi Ranch, Morgan Stanley, BRAC and GSA accounts. According to Driscoll, defendants took those adverse employment actions against him because of his disability. Further, Read, Woolson and Chillingworth

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2 The complaint also included causes of action for negligent supervision, defamation and invasion of privacy, but Driscoll advises he does not contest summary judgment on those claims. The complaint also included Unum as a defendant, but it is not involved in this appeal.

allegedly harassed Driscoll based on his disability, creating a hostile work environment and altered conditions of employment.

The tortious constructive discharge claim was also based on disability discrimination, and the claims for intentional and negligent infliction of emotional distress were based on disability harassment.

The breach of contract claim was based on a provision of the employment contract that stated the parties were to "use their skill, efforts, and abilities in cooperating to carry out the terms of this Agreement for the mutual benefit of Broker and Salesman." The complaint alleged that in violation of this clause "CBRE promoted a policy of investing only in what managers perceived to be the top 20% of producers. Managers were encouraged to specifically withhold investing time, resources and capital into brokers which the managers considered to be 'low performers.' It was CBRE's belief that by ceasing to provide opportunities for growth to these 'low producers,' CBRE would ensure that they would eventually quit." The complaint also alleged CBRE breached the implied covenant by treating him disparately and constructively terminating his employment based on his disability.

In August 2007 defendants moved for summary judgment. They argued the discrimination and harassment claims were time-barred, Driscoll could not establish a prima facie case since the decision makers in most of the alleged incidents had no knowledge of his disability, and even if he could establish a prima facie case, defendants had a legitimate and nondiscriminatory basis for their conduct. Defendants argued the constructive discharge and emotional distress claims fail because they are based on the

alleged discrimination and harassment. They argued the breach of contract and breach of the implied covenant claims fail because the contract did not entitle Driscoll to any particular assignment or commission.

In January 2007 the court granted the motion.[3] The court rejected the statute of limitations defense to the discrimination and harassment claims, finding triable issues of fact as to whether the alleged conduct was a continuing violation. The court also found Driscoll established a prima facie case of discrimination and harassment based on disability. The court, however, determined defendants' evidence established legitimate, non-discriminatory reasons for their actions, and Driscoll did not produce evidence implying a discriminatory motive. Absent discrimination or harassment, the court found no ground for claims for constructive discharge, negligent supervision or emotional distress. To the extent emotional distress claims were not based on discrimination or harassment, the court found they were subject to the workers' compensation exclusivity rule. Further, the court found no triable issues on the breach of contract and breach of the implied covenant claims, as the contract did not specify Driscoll's entitlement to any particular work assignments. Judgment was entered for defendants on March 28, 2008.

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3 Driscoll dismissed Chillingworth from the complaint before the hearing.

DISCUSSION

I

Disability Discrimination and Harassment

A. *Burdens of Proof on FEHA Claims*

The FEHA prohibits an employer from terminating or otherwise discriminating against any employee on enumerated grounds, including physical or mental disability. (Gov. Code, § 12940, subd. (a).) The FEHA also prohibits an employer from harassing an employee on the ground of disability. (Gov. Code, § 12940, subd. (j)(1).) Driscoll's discrimination and harassment claims are based on the same alleged conduct.

"Disparate treatment," the form of discrimination at issue here, "is *intentional* discrimination against one or more persons on prohibited grounds." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20 (*Guz v. Bechtel*).) Because direct evidence of discriminatory motive is ordinarily unavailable, California courts have adopted a "three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination . . . based on a theory of disparate treatment." (*Id.* at p. 354, citing *McDonnell Douglas Corp. v. Green* (1971) 411 U.S. 792.)[4] Under the *McDonnell Douglas* test, (1) the plaintiff/employee must set forth sufficient evidence to establish a prima facie case of discrimination, (2) the defendant/employer must then

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4 "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz v. Bechtel, supra,* 24 Cal.4th at p. 354.)

articulate a legitimate, nondiscriminatory reason for the adverse employment action, and (3) the employee then has the opportunity to show the employer's articulated reason is pretextual. (*Guz v. Bechtel, supra,* 24 Cal.4th at p. 355.)

Plaintiff's prima facie burden is minimal, and the specific elements may vary depending on the particular facts. Generally, plaintiff must show "(1) he was a member of a protected class, (2) he was qualified for the position . . . sought or was performing competently in the position . . . held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel, supra,* 24 Cal.4th at p. 355.) To make out a prima facie case of harassment, plaintiff must show he or she was subject to, for instance, derogatory comments "sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment. [Citation.]' " (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1045.)

Notwithstanding the *McDonnell Douglas* test, "like all other defendants, the employer who seeks to resolve the matter by summary judgment must bear the initial burden of showing the action has no merit." (*Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1058; *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1156.) A defendant satisfies this burden by showing one or more of plaintiff's prima facie elements is lacking, that the adverse employment action was based on legitimate, nondiscriminatory factors, or that there is a complete defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*); *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203, citing

Texas Dept. of Community Affairs v. Burdine (1981) 450 U.S. 248, 255, fn. 8 [101 S.Ct. 1089].) " 'Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' " (*Aguilar, supra,* 25 Cal.4th at p. 849.) The burden-shifting rules apply equally to claims of harassment under the FEHA. (*Chen v. County of Orange* (2002) 96 Cal.App.4th 926, 948-949 [retaliation]; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614 [harassment].)

When, as here, plaintiff's case relies exclusively on circumstantial evidence of pretext, the evidence " 'must be "specific" and "substantial" . . . to create a triable issue with respect to whether the employer intended to discriminate' on an improper basis." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69.)

In contrast, where there is direct evidence of a discriminatory or retaliatory intent " ' "a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." [Citation.] The plaintiff is required to produce "very little"

direct evidence of the employer's discriminatory intent to move past summary judgment.' " (*Ibid.*)[5]

We review a summary judgment ruling de novo, applying the same standards as the trial court. (*Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 997, 999.) " 'We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. [Citations.]' " (*Morgan v. Regents of University of California, supra,* 88 Cal.App.4th at p. 67.)

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5 Driscoll complains the court erroneously relied on the "more likely" standard set forth in *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031. In *Cucuzza,* the court explained that "even though we may expect a plaintiff to rely on inferences rather than direct evidence to create a factual dispute on the question of motive, a material triable controversy is not established unless the inference is reasonable. And an inference is reasonable if, and only if, it implies the unlawful motive is more likely than defendant's proferred explanation." (*Id.* at p. 1038.) In support, *Cuzcuzza* cites *Aguilar, supra,* 25 Cal.4th at p. 857. (*Cuzcuzza, supra,* at p. 1038 [erroneously citing p. 858 of *Aguilar*].) Driscoll argues the *Cuzcuzza* court's reliance on *Aguilar* was improper because in *Aguilar* the court approved the "*more likely*" standard in the context of an antitrust action for an unlawful conspiracy. (*Aguilar, supra,* at p. 857.) Courts, however, routinely use the "more likely" standard in the context of a summary judgment motion in a FEHA action. (See, e.g., *Morgan v. Regents of University of California, supra,* 88 Cal.App.4th at p. 68; *DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 553; *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 140; *King v. United Parcel Services, Inc.* (2007) 152 Cal.App.4th 426, 433; *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 112; *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1220.) The "more likely" standard is appropriate when the plaintiff relies exclusively on circumstantial evidence in opposition to a summary judgment motion, as the evidence must be substantial to defeat the motion. (*Morgan v. Regents of University of California, supra, 88 Cal.App.4th* at p. 69.)

B. *Specific Claims*

Driscoll does not dispute that defendants met their burden of producing competent evidence their conduct was based on legitimate, nondiscriminatory reasons, and the reasons are legally sufficient to show his claims lack merit. He contends summary judgment was improper because he met his burden of producing evidence supporting a rational inference the stated reasons are pretextual, and the true cause of defendants' conduct was disability discrimination and harassment. As we explain below, we conclude that with respect to each employment decision he failed to meet his burden.

1. *Titan*

With respect to the Titan account, CBRE submitted the declaration of Mark Sprague, who formerly worked for a Los Angeles commercial real estate company, Insignia/ESG, Inc. (Insignia), which had Titan as a client. Sprague was on the brokerage team at Insignia that managed the Titan account, "which involved selecting brokers to perform acquisition and disposition assignments on behalf of Titan in various cities nationwide." In 2003 CBRE acquired Insignia, and the Titan account and Sprague moved to CBRE. Insignia's team leader on the Titan account left before the merger, and Sprague stepped into his shoes. The declaration explains that "Because no one was dislodged from the Titan account team, there has been no reason for me to add any permanent CBRE brokers to the account team post-merger." The declaration states that Sprague, in consultation with Titan, selected brokers to represent Titan, and Read,

Woolson and Chillingworth never participated in the decisions. Further, Sprague neither met Driscoll nor was aware of his disability until he filed suit.

Driscoll produced no evidence refuting Sprague's declaration. Driscoll submitted his own declaration, which states: "Read assured me that if CBRE got any Titan work, that I would be involved at all levels in CBRE with Titan assignments in the San Diego area," and he later asked Read to be considered for the position of Titan's team manager, but Sprague got the position. Driscoll also cited Sprague's deposition testimony that he was "pretty sure" Read never talked to him about Driscoll's interest in being the broker on the Titan account. Sprague testified he did not ask Read for input on who may be the best broker for Titan and Read never recommended anyone.

Driscoll asserts his evidence shows "the decision to exclude Driscoll was not made by Sprague, but by Read." Driscoll also cites the rule: "When there is a discrepancy between a deposition and a declaration submitted in connection with an opposition to a motion for summary judgment, the deposition controls." (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1328, fn. 3.) Sprague's deposition testimony, however, does not suggest Read made the decision pertaining to the Titan account. Rather, he merely remained silent on the matter as it was within Sprague's control. Sprague's declaration and deposition testimony are entirely consistent. Driscoll produced no evidence permitting a jury to reasonably find pretext. "[T]he great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was

discriminatory." (*Guz v. Bechtel, supra,* 24 Cal.4th at p. 361, fn. omitted.) "[S]ummary judgment for the employer may thus be appropriate where, given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." (*Id.* at p. 362, relying on *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 148-149 [120 S.Ct. 2097].)

2. *Bressi Ranch*

With respect to the Bressi Ranch matter, defendants submitted a declaration from Peter Rooney, a manager of the developer, Sares-Regis. Rooney's declaration states that in September 2003 he told Rick Sparks, a salesperson with CBRE,[6] that Sares-Regis was concerned about using CBRE for the remarketing, and it was particularly concerned about Driscoll. The declaration explains that although Driscoll performed well on the property acquisition, he "failed to provide adequate and appropriate information about the Carlsbad market during the Bressi Ranch escrow period;" "we wanted a broker with significant experience in leasing and selling comparable properties," and Driscoll "lacked this qualification"; and "Driscoll's business primarily consisted of tenant representation throughout the United States [and] we needed brokers expert in representing landlords and business park owners in North San Diego County." In Rooney's view, CBRE's proposed remarketing team "lacked the kind of 'superstar' type broker with strong local

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6 Sparks and another CBRE sales person, Matt Strockis, represented the company that sold the Bressi Ranch property to Sares-Regis.

market knowledge." Accordingly, Rooney advised CBRE he believed CBRE and Driscoll were not the most qualified to remarket Bressi Ranch, and he intended to invite other brokerage firms to compete for the business.

In an effort to get the account, CBRE recruited former CBRE broker Lannie Allee back to the company because of his extensive experience in selling land in Carlsbad. Rooney's declaration states CBRE made a listing presentation, and "I was very impressed with the new team [it] had assembled. In particular, I was impressed with the extensive experience of new broker [Allee] in selling . . . business parks, located in the Carlsbad market," and "I was also favorably impressed by Roger Carlson and his background with multiple sale and lease transactions in San Diego County." After the presentation, Rooney consulted with Hagestad, and they concluded CBRE would get the remarketing account "because of the addition of [Allee] and [Carlson] to the listing team. [However,] [b]ased on our concerns with [Driscoll], we asked CBRE that he not be included on the re-marketing team." Rooney's declaration also states: "CBRE did not decide that[Driscoll] should be removed from the Bressi Ranch re-marketing efforts—that was my decision, along with John Hagestad."

Further, the Rooney declaration states that when Driscoll learned of the decision, he contacted the developer and asked to participate in some way. Rooney and John Hagestad, another manager, decided that "as a measure of our firm's good will, [the developer] would allow[Driscoll] to hold a minor role on the CBRE team."

Additionally, the Rooney declaration states that until Driscoll filed his lawsuit, "I was unaware of any medical condition or disability of [Driscoll], and no one at CBRE

ever told me anything about such medical condition or disability." Further, "at no time did a representative of CBRE suggest to me that[Driscoll] should not be involved" in the Bressi Ranch remarketing.

Hagestad testified in deposition that after the developer initially refused to use Driscoll, "I felt a moral obligation to help [him] out. . . . I probably felt there wouldn't be a contribution to the team, but I felt a moral obligation to help [him] because he had been very helpful to us in the acquisition of the property." Hagestad told CBRE that he and Rooney "were prepared to give[Driscoll] a minor position on the team," meaning "Not lead," "Not significant," and "Not important."

Driscoll contends he produced "strong evidence that the 'Bressi Ranch' decision *was* made by CBRE." He argues that the developer instructed CBRE to "leave him off the remarketing team when *Driscoll's supervisors told them Driscoll was not a 'team player*,' " (italics added) and "Rooney explained in his deposition that Sares-Regis excluded Driscoll from the remarketing team *because CBRE told them Driscoll was a 'not a team player*.' " (Italics added.)

Driscoll, however, has not provided us with a citation to Rooney's deposition testimony.[7] Driscoll does cite Hagestad's deposition testimony. He was asked, "Did you

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7 "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel." (9 Witkin, Cal. Procedure (5th ed. 1997) Appeal, § 701, p. 769.) Accordingly, where a party provides a brief without "record references establishing that the points were made below," we may "treat the points as waived, or meritless, and pass them without further consideration." (*Troensegaard* v. *Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.)

ever hear from anybody in CBRE that[Driscoll] was not a team player?" He responded: "I think—Rick Sparks and I probably had that discussion at one point in time. That, again, based on [Driscoll's] history at [CBRE] that he worked on his own. That he was a bit of a loner. He did not work as part of a team." Hagestad clarified, however, that *he* probably told *Sparks* that he [Hagestad] believed Driscoll was not a team player. Hagestad explained: "Because . . . his course of conduct over the sum eight or 10 years that I had kind of seen and heard about his involvement. This was what he . . . told us that he had been out on his own. He had been working on transactions by himself. He was not part of a team in the Carlsbad office. He was an individual broker. He was a person who did things on his own."

Hagestad also testified he did not recall that Sparks or anyone else at CBRE made any derogatory or negative comments about Driscoll. Hagestad said his discussions with Sparks "were not negative" and CBRE was "concerned about getting a listing."

In their respondents' brief, defendants point out that Driscoll's evidence does not show CBRE told the developer he was not a team player. In his reply brief, however, Driscoll maintains this claim. He asserts that after he learned the developer did not want him on the remarketing team, he met with Hagestad and Rooney and they told him "they had originally assumed [he] would be on the Bressi Ranch remarketing team . . ., but instructed CBRE to leave him off the remarketing team **because CBRE told them Driscoll was not a 'team player**.' " His citations to the record however do not support this contention.

Driscoll cites his deposition testimony that Woolson told him he would probably not be on the developer's remarketing team because "I wasn't a team player. I didn't have experience and I wasn't the kind of person *the client* wanted to deal with." (Italics added.) That does not indicate that Woolson or anyone else at CBRE referred to Driscoll as not a team player. Indeed, he cites a statement in his declaration that "Woolson told me that [the developer] did not believe that I was a team player and I was not the type of person they wanted representing them."

Additionally, Driscoll again cites Hagestad's deposition testimony that he probably had a conversation with Sparks about the team player issue. As discussed, however, Hagestad clarified that he probably told Sparks he [Hagestad] believed Driscoll was not a team player. Contrary to Driscoll's assertion, Hagestad's deposition testimony is not unclear on who characterized Driscoll as not a team player. The team player issue does not raise any triable issue pertaining to pretext or animus based on disability.

Driscoll also contends he raised triable issues of fact as to the real reason CBRE excluded him from the remarketing team *after* Rooney and Hagestad agreed he could have a minor role. Driscoll cited Rooney's deposition testimony that he signed a listing agreement for CBRE that included Driscoll as part of the developer's "core marketing team." Further, Driscoll cited Rooney's and Hagestad's deposition testimony that after initially rejecting Driscoll's involvement altogether, they told Sparks he could play a minor role on the marketing team, and they had no conversations with CBRE pertaining to his exact role. Driscoll also relied on the statements in his declaration that Rooney and Hagestad told him his exact role "was being left up to CBRE," and "I did ask [them] for

and did expect to have a substantial role," and "I also expected to participate in the remarketing commissions paid to CBRE at a rate no less than any other member of the team, other than [Allee], the team leader."

Driscoll's declaration also states that a marketing brochure CBRE prepared and disseminated did not include Driscoll's name, and CBRE gave him no role in the remarketing activities. The declaration also states, however, that CBRE did give him a role—"to bring any work on Bressi Ranch to . . . Sparks"—but he was dissatisfied with it. Driscoll testified in deposition that although Allee and Sparks refused to give him a greater role, Sparks nonetheless agreed to share his commissions with Driscoll, which "would have brought [his] commission deal relative to remarketing efforts to approximately 6.25 percent." When Driscoll was asked whether he accepted the decision not to give him an "enhanced or more visible role" in the remarketing, Driscoll said "Yes."

Again, Driscoll's evidence does not permit a finding of pretext or animus based on disability. CBRE had a client who lacked confidence in him, did not want him on the remarketing team, and only agreed out of a sense of obligation to allow him a minor role. It appears that CBRE did allow Driscoll a minor role, but it did not meet his expectations. In any event, even if CBRE ultimately cut him out of the account altogether, the decision was reasonable given the developer's expectation that he would play an unimportant role and not make any real contribution to the remarketing effort. When the developer voiced its displeasure with Driscoll and insisted on drastically restricting his involvement, CBRE was not required to nonetheless place him on the remarketing team. In other words,

although it was ultimately CBRE's decision, given its client's expressed misgivings about Driscoll, no inference of discriminatory animus arises as a result of that decision.

3. *Morgan Stanley*

With respect to Morgan Stanley, defendants submitted the declaration of Read and Chillingworth, in which they explained that all of Morgan Stanley's business was being handled by a New York broker, and that Driscoll would have to get the approval of the New York broker in order to handle the listing himself. With respect to the requested commission reduction, which was ultimately denied by Chilllingworth, they explained that because Morgan Stanley had given its national business to a competitor, they were unwilling to give Morgan Stanley a discount which might negatively impact CBRE's ability to get full commissions from Morgan Stanley in other markets. Defendants also pointed out that Driscoll went back to the Morgan Stanley representative and offered to reduce his own portion of the commission. Morgan Stanley declined his offer and instead agreed to pay CBRE a full commission, and in the end Driscoll earned a gross commission of $122,000 from Morgan Stanley.

There is nothing in the record which suggests Read was in error in telling Driscoll that before taking the listing he would need to get the approval of the New York broker before taking the local Morgan Stanley listing. Moreover, there is nothing in the record which suggests that Chillingworth's ultimate decision to deny Morgan Stanley a discount was anything other than a hardnosed business decision unrelated to Driscoll's PTSD. Thus there are no facts related to the Morgan Stanley transaction from which a discriminatory motive can be inferred.

4. *BRAC*

In response to Driscoll's BRAC contentions, defendants relied on Driscoll's concession that CBRE did not win any contract for BRAC work. Defendants also relied on a declaration from Read which stated: "CBRE's Washington, D.C. office's broker team eventually chose the members of the BRAC team, identifying [Driscoll] in an advisory title rather than the leadership role he wanted. This interim designation proved inconsequential: CBRE lost out on the contract to Booz Allen, leaving no BRAC team for [Driscoll] to lead."

In response, Driscoll cited his declaration in support of his assertion "CBRE did not support [him] in his effort to get the BRAC work in the first place." As the trial court noted in its ruling, however, the BRAC issue "is of little consequence because CBRE never received the BRAC work." Because CBRE did not get the BRAC work, there was no adverse employment decision or consequence and no actionable discrimination or harassment. An adverse employment action exists "where an employer's action negatively affects its employee's compensation." (*Fonseca v. Sysco Food Services of Arizona, Inc.* (9th Cir. 2004) 374 F.3d 840, 847.)

5. *GSA Certification*

With respect to the GSA Certification, defendants submitted a declaration from Woolson, which stated: "The GSA is an arm of the federal government that procures outside contractors. In 2005, [Driscoll] expressed interest in becoming certified to serve as CBRE's [GSA] representative, the point of contact whom the GSA will regularly contact regarding possible federal government outside contract work. [Driscoll] took

steps toward becoming the GSA certified representative for CBRE, enlisting the help of James McCarthy, CBRE's marketing officer. At CBRE's expense, [McCarthy] helped [Driscoll] to commence the certification process, and the two gathered additional information regarding GSA certification by attending a seminar on the topic.

"As I learned more about the role and duties of the GSA representative, I decided that it would be in the best interest of CBRE if I assumed the role of GSA representative because of my position as Managing Director. By attaching the GSA representative designation to the level of Managing Director, rather than an individual broker, CBRE would essentially be institutionalizing this role. In other words, with a Managing Director as the permanent figurehead, CBRE would establish a consistent business relationship with the government, independent of any one person. Equally important, with a Managing Director as the primary contact, I could assure the GSA that there would be no conflict of interest because I, personally, would have no financial gain in landing a particular contract. In contrast, there is a potential for a conflict of interest if a broker, who is a salesperson, were the primary contract because he or she could divert many or all of the GSA assignments to himself or herself."

Driscoll cited certain paragraphs from his own declaration, but they merely recounted that he tried to get the GSA certification and in his opinion he was more qualified for it, but Woolson ultimately stepped in. Driscoll's declaration does not dispute Woolson's declaration, or raise any question as to pretext. Even if Driscoll's superior qualifications are debatable on the merits, the issue has little or no relevance in determining whether Woolson's stated reason was a mask for disability discrimination. If

not discriminatory, an employer's "true reasons need not necessarily have been wise or correct." (*Guz v. Bechtel, supra,* 24 Cal.4th at p. 358.)

6. *Jones, Carlo and Retread*

With respect to the Jones incident, Woolson submitted a declaration in which he stated that he sat down with Jones, who he had known for a number of years, because Jones appeared interested in talking to him about listings Woolson had. With respect to the Carlo lunch, Read and Woolson submitted declarations denying any attempt to divert Carlo's business.

Like the trial court, we find that even if the record fully supports Driscoll's contention that Woolson and Read acted against his interests in both the Jones and Carlo incidents, and that the reference to retread and rejects was improper, there is nothing in the record which would support an inference this conduct was borne out of any animus related to Driscoll's PTSD as opposed to a simple improper level of competition with one of their subordinates. As we noted in *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005: " 'The [employee] cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. [Citations.] . . . .' "

In short then, summary judgment was proper on the discrimination and harassment causes of action, as defendants produced evidence of legitimate, nondisciminatory reasons for their conduct, and Driscoll produced no evidence from which a reasonably jury could infer discrimination or harassment. Given this holding, we are not required to

address defendants' contention that Driscoll cannot establish a prima facie case of discrimination or harassment because some defendants lacked knowledge of his disability, defendants' conduct did not constitute adverse employment actions, and most claims are time-barred.

B. *Cumulative Evidence*

Driscoll also contends that even if the specific events do not suggest discrimination or harassment individually, they do so considered as a whole and along with evidence of additional discriminatory conduct he presented. He cites *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740 (*Johnson*), which states: "Although we have set out several matters which *by themselves* will not constitute substantial evidence that defendant's stated reason for firing plaintiff was pretextual or that defendant acted with a discriminatory animus when it fired her, there remains the question whether these matters, *when taken together,* do constitute sufficient evidence to demonstrate a triable issue of fact with respect to plaintiff's contention that her pregnancy was the true cause of defendant's decision to fire her." (*Id.* at p. 758.) In *Johnson* the plaintiff was fired the same day she returned from a short sick leave related to her pregnancy, the employer gave her no reason for its action, and a supervisory employee admitted she had concerns about having pregnant employees at work. Under those circumstances, the appellate court found there were triable issues as to whether the employer's stated reason that plaintiff falsified her time records was pretextual. (*Ibid.*)

Here, in contrast, Driscoll did not claim any adverse action shortly after Read learned of his condition in November 2003. Rather, the first incident of discrimination the complaint alleged began in April 2003.[8] Further, it appears CBRE provided Driscoll with business explanations for most, if not all, its decisions, such as the developer's lack of confidence in him for the remarketing effort at Bressi Ranch, CBRE's failure to obtain the BRAC work, and Woolson's decision to be the GSA certification representative himself. Further, there is no evidence any CBRE employee voiced any concern about having a salesperson with PTSD on the job.

Thus, in considering the evidence cumulatively, we conclude there is no triable issue of material fact.

C. *Accommodation*

Additionally, Driscoll contends there are triable issues of fact pertaining to whether defendants accommodated his disability. Under section 12940, subdivision (m), it is illegal for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." "In addition to a general prohibition against unlawful employment discrimination based on disability, FEHA provides an independent cause of action for an employer's failure to provide a reasonable

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8 "[T]emporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination [or other adverse action]." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353.) "Where the employee relies solely on temporal proximity in response to the employer's evidence of a nonretaliatory reason for termination, he or she does not create a triable issue as to pretext, and summary judgment for the employer is proper." (*Id.* at p. 357.)

accommodation for an applicant's or employee's known disability." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54.) The complaint here alleged defendants failed to accommodate Driscoll's disability.

"Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. [Citation.] Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith." (*Gelfo v. Lockheed Martin Corp., supra,* 140 Cal.App.4th at p. 54; *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252.) The employee is not required to invoke the FEHA, mention the term "accommodation" or request a specific accommodation to trigger the interactive process. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954.) The employee, however, " 'can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge. [Citations.] An employer also has no duty to accommodate an employee who denies she [or he] has a disability or denies a need for accommodation.' " (*Ibid.*)

It is undisputed that when Read learned of Driscoll's disability in November 2002 he immediately offered to accommodate him by giving him up to six months off. Driscoll, however, denied any need for accommodation. Driscoll's declaration states that he told Read "I did not need any time off and that I intended to continue working."

Further, he admitted in deposition that he never requested any other type of accommodation.

Driscoll asserts that in opposition to the summary judgment motion he "specifically averred that in 2003, he had repeatedly asked CBRE for accommodations to alleviate the effects of his disorder." In support, he cites his declaration, at page 1099 of the appellant's appendix, which states: "In 2003, I asked for accommodations from CBRE. I complained on several occasions to my immediate supervisor [Woolson] that I did not have a secretary assigned to work directly with me and that I had recently again gone through a number of temporary secretaries who had trouble doing my work without a lot of errors. [Woolson] appeared to listen; however, additional or more qualified staff was not provided to me." There is no evidence Woolson even knew about Driscoll's disability. Driscoll did not want anyone at CBRE to know about it, and he stated in a declaration that he told no one at CBRE about his disability, including Read. An employee cannot both keep his disability a secret from his employer and request accommodation for the disability. Even if knowledge is somehow imputed to Woolson, however, this statement does not show any request for an accommodation to "alleviate the effects of [Driscoll's] disorder." Rather, Driscoll merely requested a competent full-time secretary.

Driscoll also asserts he "asked Woolson several times to assign secretarial and staff support to accommodate Driscoll's need to organize tasks and manage his time." In support, Driscoll cites his declaration at pages "1093, 1109, 1107, 1108-9" of the

appellant's index. He does not, however, refer to any specific paragraphs, and thus we are left to guess what he may believe supports his position.

Page 1093 states that *before* Driscoll's PTSD diagnosis: "Many of the staff assigned to me in the CBRE Carlsbad office were temporary help, not qualified to do the work assigned." Page 1107 states: "I put substantial efforts into convincing my superiors to provide me the necessary support to attempt to obtain both BRAC and GSA work." Pages 1108-1109 state: "In 2003, I complained bitterly to Michelle Candland, assistant regional manager for CBRE, about my disparate treatment regarding the Titan account/assignment. In particular, I complained about [Read's] failure to honor his promise to me regarding participating on the Titan account. I expected her to intervene on my behalf. She did nothing." Page 1109 also states that between 2003 and 2005 Driscoll complained to Read and Woolson "about my treatment regarding my role in the Bressi Ranch remarketing team," and in late 2004, "I complained over and over again to [Read] regarding my failure to get any support from CBRE for the Morgan Stanley assignment in Carlsbad." None of these statements shows Driscoll requested any accommodation for PTSD or to help him "organize tasks and manage his time."

Driscoll also cites Read's deposition testimony that he did not believe he had ever been responsible for implementing an accommodation for a disabled employee. That does not mean, however, that his offer to let Driscoll take several months off work was not an offer of accommodation. Summary judgment was proper on the accommodation claim.

II

Constructive Discharge

"Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245.)

The complaint's constructive discharge cause of action is also based on unlawful disability discrimination and harassment. The court correctly determined that because there are no triable issues of fact as to discrimination or harassment, summary judgment is also proper on the constructive discharge claim.

Driscoll raises the "retread and reject brokers" comments in arguing there are triable issues of fact as to the viability of his constructive discharge claim. Driscoll's declaration states that in the fall of 2003, Woolson "complained to me that the CBRE Carlsbad office was full of retread and reject brokers . . . . This was a statement made by [Woolson], directly to me again in 2004." "[T]o amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient to support a constructive discharge claim." (*Turner v. Anheuser-Busch, Inc., supra,* 7 Cal.4th at p. 1247.) Woolson's comments do not indicate he was referring to Driscoll's disability. Driscoll merely speculates that was

the case, and "speculation cannot be regarded as substantial responsive evidence." (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735.) As a matter of law, Woolson's comments did not create intolerable working conditions.

Driscoll also cites the statement in his declaration that he "witnessed acts of discrimination between senior managers and female staff." He cites *Cruz v. Coach Stores, Inc.* (2d Cir. 2000) 202 F.3d 560, 570, for the general rule that a plaintiff claiming hostile work environment may introduce evidence of the employer's harassment of others. "Because the crucial inquiry focuses on the nature of the workplace environment as a whole, a plaintiff who herself experiences discriminatory harassment need not be the target of other instances of hostility . . . for those incidents to support her claim. [Citation.] Nor must offensive remarks or behavior be directed at individuals who are members of the plaintiff's own protected class. Remarks targeting members of other minorities, for example, may contribute to the overall hostility of the working environment for a minority employee." Driscoll's declaration, however, is merely conclusory. It states no specific facts pertaining to CBRE's treatment of others, and thus raises no triable issue of material fact.[9]

III

Emotional Distress

Driscoll concedes that workers' compensation is the exclusive remedy for any emotional distress claims unrelated to discrimination and harassment. (*Livitsanos v.*

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9 Given our holding, we are not required to address CBRE's assertion that Driscoll failed to exhaust administrative remedies on his constructive discharge claim.

Superior Court (1992) 2 Cal.4th 744, 756 [workers' compensation "provides the exclusive remedy for torts that comprise 'a normal part of the employment relationship' "].) He also concedes his claims for negligent and intentional infliction of emotional distress are based on disability discrimination and harassment. Accordingly, summary judgment was also proper on these claims.

IV

Breach of Contract/Breach of Implied Covenant

A single cause of action alleged breach of contract and breach of the implied covenant of good faith and fair dealing. For the breach of contract claim, the complaint cited the provision in Driscoll's employment agreement that "Broker and Salesman agree to all the foregoing terms and conditions and to use their skill, efforts, and abilities in cooperating to carry out the *terms of this Agreement* for the mutual benefit of Broker and Salesman." (Italics added.)

CBRE established the above provision was the only contract provision at issue, and it does not confer rights on Driscoll to any right to particular work assignments. The court's ruling notes that "because the contract does not reference particular work assignments Defendants' alleged conduct of refusing Plaintiff certain assignments, is insufficient to establish breach of contract. Absent evidence of breach, there are no triable issues of material fact . . . ."

Driscoll contends the court failed to consider the language of the above contract provision. As the record shows, however, in fact the court expressly addressed the provision.

Driscoll cites *National Data Payment Systems v. Meridian Bank* (3d Cir. 2000) 212 F.3d 849, 854, for the proposition that the "duty of best efforts 'has diligence as its essence' and is 'more exacting' than the usual contractual duty of good faith." In that case, the parties to a purchase agreement agreed to use their "best efforts" to close the deal by a certain date. (*Id.* at pp. 851-852.) One party sued the other for failing to use best efforts to consummate the transaction. (*Id.* at p. 853.) The court affirmed summary judgment on the claim as there was evidence the transaction would not have closed on the designated date even if the defendant employed best efforts. (*Id.* at p. 854.) Here, the contract required the parties to use their skill and efforts in carrying out the terms of the contract. Driscoll produced no evidence of any failure of CBRE to use its skill and efforts in relation to any particular contract obligation. In particular, Driscoll produced no evidence that any statements made to Jones or Carlo deprived him of any commissions. Accordingly, there is no question of fact requiring trial on the breach of contract claim.

Driscoll asserts that even if there was no breach of contract as a matter of law, his claim for breach of the implied covenant of good faith and fair dealing is viable. Driscoll cites the court's tentative ruling, which states in its discussion of the discrimination and harassment claims that "Construing all the evidence in favor of Plaintiff, *at best, these events reflect Defendants' attempts to divert Plaintiff's business to themselves*. There is no evidence to suggest Defendants' [*sic*] were motivated by Plaintiff's disability." (Italics added.) Driscoll asserts that since the tentative ruling indicates defendants sought to steal

his business, triable issues of material fact preclude summary judgment on the breach of implied covenant claim.

Admittedly, "There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract. [Citation.] This covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose." (*Harm v. Frasher* (1960) 181 Cal.App.2d 405, 417.) However, "A summary judgment motion is directed to the issues framed by the pleadings." (*Reliance Nat. Indemnity Co. v. General Star Indemnity Co.* (1999) 72 Cal.App.4th 1063, 1073.) The breach of implied covenant cause of action alleged CBRE breached the implied covenant "by disparately treating [Driscoll] and by constructively terminating [his] employment because of his disability." Because the breach of implied covenant cause of action is based solely on discrimination and harassment, the tentative ruling is unhelpful to Driscoll since the court properly found any attempt to divert business from him was not based on his disability. The complaint does not allege that *apart* from the alleged discrimination and harassment, CBRE breached the implied covenant.

V

Memorandum Exceeding 20 Pages

The court denied Driscoll's application to file a memorandum of points and authorities exceeding 20 pages because the application violated a rule of court that

requires applications to be filed at least 24 hours before the memorandum is due. (Cal. Rules of Court , rule 3.1113(e).) Because of the denial, the court deemed defendants' motion for summary judgment unopposed as to certain causes of action discussed in pages 21 through 25 of the memorandum. Driscoll asserts the court abused its discretion by denying the application since this is a complicated matter that required 25 pages.

Driscoll ignores, however, the court's statement in its ruling: "Even if the court were to consider pages 21-25 of Plaintiff's opposing points and authorities, the result would not change." The ruling went on to consider and discuss Driscoll's showing on the causes of action discussed in pages 21 through 25 of his memorandum. Accordingly, any arguable abuse of discretion caused no prejudice.

VI

Read's Second Deposition Transcript

Read's second deposition session was held on September 19, 2007. Driscoll filed his original opposition to the summary judgment motion on October 5, 2007. In support of his original opposition, Driscoll submitted excepts from the transcript of Read's first and second deposition sessions. One of his attorneys, Douglas Shepherd, submitted a declaration on October 5 that states he took Read's first deposition on September 18, 2007, and his second deposition on September 19, 2007. The declaration sets forth portions of Read's testimony from both deposition sessions.

In an October 18, 2007 order, the court continued the summary judgment motion because Driscoll's separate statement violated Code of Civil Procedure section 437c and a rule of court by not correctly citing supporting evidence. For instance, it cited to

paragraphs of declarations, but not to page and line numbers. The court allowed Driscoll to correct the deficiencies in his separate statement and file a new memorandum of points and authorities referring to the evidence cited in his separate statement.

Driscoll's revised opposition papers differed significantly from his original opposition. His separate statement went from 50 to 130 pages, he cited different and additional evidence, and lodged nine additional exhibits. Defendants objected to the additional evidence and the court excluded it.

On appeal Driscoll argues the court abused its discretion by excluding "two newly-acquired exhibits" he submitted when he filed his amended separate statement, including in particular Read's second deposition. We find no abuse of discretion. The record does not show that the exhibits were unavailable at the time the initial opposition was filed and Driscoll has not shown how the excluded exhibits were material to the opposition.

DISPOSITION

The judgment is affirmed. Defendants are entitled to costs on appeal.

BENKE, ACTING P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.